Supreme Court, U.S.
FILED
JAN 22 1999
CLERK

No. 98-1160

In the Supreme Court of the United States

OCTOBER TERM, 1998

SAUL NAVAS, ET AL., PETITIONERS

v.

JANET RENO, ET AL.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE CROSS-RESPONDENTS

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

999

QUESTION PRESENTED

Whether Section 440(a) of the Antiterrorism and Effective Death Penalty Act of 1996 and Section 309(c)(4)(G) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 deprived the court of appeals of jurisdiction over cross-petitioners' petitions for review of their deportation orders.

TABLE OF AUTHORITIES

Cases: Page

Magana-Pizano v. *INS*, 152 F.3d 1213 (9th Cir. 1998), petition for cert. pending, No. 98-836 ..... 4, 5, 6

Soriano, In re, Int. Dec. No. 3289 (BIA Feb. 21, 1997) 1, 2, 3, 5, 6

Trans World Airlines, Inc. v. *Thurston*, 469 U.S. 111 (1985) 6

Constitution and statutes:

U.S. Const. Art. I, § 9, Cl. 2 (Suspension of Habeas Corpus Clause) 6

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214:

§ 440(a), 110 Stat. 1276-1277 ..... 3, 4, 5

§ 440(d), 110 Stat. 1277 ..... 1-2, 3, 4

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546:

§ 212(d), 110 Stat. 3009-571 5

§ 309(c)(4)(G), 110 Stat. 3009-626 ..... 3, 4, 5

8 U.S.C. 1105a(a) (1994) 2

8 U.S.C. 1182(c) (1994) 1, 2

28 U.S.C. 2241 ..... 2, 3, 6

In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-1160

SAUL NAVAS, ET AL., PETITIONERS

v.

JANET RENO, ET AL.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE CROSS-RESPONDENTS

As explained in detail in our petition for a writ of certiorari in *Reno* v. *Navas*, No. 98-996 (filed Dec. 17, 1998), cross-petitioners Navas and Henderson are aliens deportable by reason of having been convicted of certain criminal offenses. The INS commenced deportation proceedings against cross-petitioners based on their criminal convictions. In each case, the alien conceded his deportability but applied for discretionary relief from deportation under 8 U.S.C. 1182(c) (1994). The Board of Immigration Appeals (BIA), however, concluded that each cross-petitioner was ineligible under Section 1182(c) for such relief. The BIA followed the Attorney General's decision in *In re Soriano*, Int. Dec. No. 3289 (BIA Feb. 21, 1997) (98-996 Pet. App. 389a-402a), that Section 440(d) of the Antiterrorism and

Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1277, which amended Section 1182(c) to make aliens convicted of certain criminal offenses ineligible for relief, should be applied in all pending deportation proceedings. See 98-996 Pet. 9-10, 14.

Each cross-petitioner then filed a petition for review of his deportation order in the court of appeals, pursuant to 8 U.S.C. 1105a(a) (1994). Cross-petitioner Navas also filed a petition for a writ of habeas corpus in district court, seeking to invoke its jurisdiction under the general federal habeas corpus statute, 28 U.S.C. 2241. Cross-petitioners argued that the Attorney General's decision in *Soriano* was wrong as a matter of statutory interpretation, and also that Section 1182(c) violated constitutional equal-protection principles insofar as it had been construed to deny eligibility for discretionary relief from deportation to aliens placed in deportation proceedings in the United States, but not aliens seeking admission to the United States at a port of entry. The district court granted Navas's habeas corpus petition, concluding that it had subject-matter jurisdiction and that the Attorney General's decision in *Soriano* was wrong, and remanded Navas's case to the BIA for the exercise of its discretion under Section 1182(c). The government appealed that decision to the court of appeals, which consolidated that appeal with Navas's and Henderson's direct petitions for review. See 98-996 Pet. 10-11, 14.[1]

---

[1] After the district court ruled on Navas's habeas corpus petition, Henderson also filed a petition for a writ of habeas corpus in the district court. No action has been taken on that petition. 98-966 Pet. App. 2a n.5.

On the question of subject-matter jurisdiction, the court of appeals, following language in earlier decisions of the circuit, concluded that (a) Section 440(a) of AEDPA, 110 Stat. 1276-1277, and Section 309(c)(4)(G) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-626, deprived it of jurisdiction over both cross-petitioners' petitions for review; but that (b) the district court did have jurisdiction under 28 U.S.C. 2241 to entertain both Navas's constitutional and non-constitutional challenges to his deportation order. See 98-996 Pet. App. 27a-37a. On the merits, the court of appeals concluded that the Attorney General's decision in *Soriano*, which held that Section 440(d) of AEDPA should be applied to all deportation proceedings pending on or after the time of AEDPA's enactment, was erroneous. *Id.* at 53a-58a. Accordingly, the court of appeals dismissed both cross-petitioners' petitions for direct review, and affirmed the district court's grant of habeas corpus relief to cross-petitioner Navas. *Id.* at 59a, 62a.

The government then filed a petition for a writ of certiorari, asking this Court to review the court of appeals' determination that the district court could exercise jurisdiction under 28 U.S.C. 2241 over cross-petitioner Navas's challenges to his deportation order, as well as the court of appeals' decision on the merits that overturned the Attorney General's construction of Section 440(d) of AEDPA in *Soriano*. In our petition, we explain (at 19-24) that, although neither the district court nor the court of appeals has jurisdiction to review the merits of the Attorney General's decision in *Soriano*, the court of appeals does have jurisdiction to review cross-petitioners' constitutional equal-protection claim, notwithstanding Section 440(a) of AEDPA

and 309(c)(4)(G) of IIRIRA, and therefore that the court of appeals had erred in dismissing cross-petitioners' direct petitions for review, to the extent that they raised that constitutional claim. We also argue that, if (contrary to our submission) the Constitution requires that some court have jurisdiction to review cross-petitioners' non-constitutional claim, that court is the court of appeals, on petition for direct review, and not the district court, on a collateral habeas corpus petition. See 98-996 Pet. 22-24. We note in our petition in this case that related issues of jurisdiction and the merits are presented by the government's petitions for a writ of certiorari in *Reno* v. *Goncalves*, No. 98-835, and *INS* v. *Magana-Pizano*, No. 98-836 (both filed Nov. 18, 1998), and we suggest in our petition that the court hold the certiorari petition in this case for the disposition of the petitions in those cases.

Navas and Henderson now have filed a conditional cross-petition for a writ of certiorari, seeking review of the court of appeals' dismissal of their petitions for review for lack of jurisdiction. They urge the Court to grant their cross-petition if it grants our principal petition (although they urge the Court to deny our petition). They also suggest that, if the Court does grant review in one or more of the three cases currently pending that present the jurisdictional and merits issues arising out of the application of Section 440(d) of AEDPA to pending deportation proceedings, it should grant review in this case, because this case would enable the Court to reach all of those jurisdictional and merits issues.

We now agree with cross-petitioners that, to ensure complete review of the jurisdictional and merits issues, the Court should grant plenary review of both our principal petition and the cross-petition in this case. In

that posture, the Court could decide in this case both whether Section 440(a) of AEDPA and Section 309(c)(4)(G) of IIRIRA prevented the court of appeals from taking jurisdiction over the various claims in cross-petitioners' petitions for review, and whether the district court had jurisdiction over the similar claims raised in Navas's habeas corpus petition under Section 2241. In addition, that posture would also ensure that —if the Court were to conclude (contrary to our submission, see 98-996 Pet. 23) that either the district court or the court of appeals had jurisdiction to review cross-petitioners' challenge to the Attorney General's denial of discretionary relief under Section 1182(c)—the Court could than resolve the merits of the reasonableness of the Attorney General's decision in *Soriano*.[2]

---

[2] Technically, the court of appeals in this case granted relief only in Navas's case, and not in Henderson's, because it was reviewing only Navas's habeas corpus petition. If, however, this Court were to conclude that jurisdiction was proper over Navas's and Henderson's petitions for direct review filed in the court of appeals to the extent those petitions challenged the Attorney General's denial of discretionary relief based on her decision in *Soriano*, but not over a habeas corpus petition filed in district court raising the same claim, there would be little point in remanding the case to the court of appeals for further consideration of the merits of the *Soriano* issue on the petitions for direct review. The court of appeals has already concluded that the Attorney General's decision in *Soriano* was wrong, and the correctness of that ruling by the court of appeals on the merits would be ripe for this Court's review if the Court concluded that the court of appeals had jurisdiction to consider that question.

The Court conceivably might conclude that Congress had deprived both lower courts of jurisdiction to review *all* constitutional and non-constitutional claims raised by cross-petitioners, as the Ninth Circuit concluded in *Magana-Pizano* v. *INS*, 152 F.3d 1213 (1998), petition for cert. pending, No. 98-836 (filed Nov. 18, 1998). In that situation, the Court would be presented with the necessity

Furthermore, absent the cross-petition, the Court might not have the authority to reverse the court of appeals' dismissal of cross-petitioners' petitions for review and to grant relief on those petitions for review (should the Court disagree with our submissions, and conclude both that the court of appeals had jurisdiction to review the challenges to the Attorney General's *Soriano* decision and that that decision was wrong on the merits). Such an order would grant relief beyond that awarded by the court of appeals, which ordinarily requires a cross-petition for a writ of certiorari. See *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 119 n.14 (1985). Accordingly, to ensure that the Court has the authority to address all the jurisdictional questions presented in the case, and, if necessary the merits—and also to grant complete relief—both the petition and cross-petition should be granted, and should be consolidated for briefing and argument.

---

of addressing the constitutional questions arising from such a complete ouster of jurisdiction. The court of appeals in this case, however, did not reach that constitutional issue because it concluded that district court jurisdiction was present under 28 U.S.C. 2241. We therefore suggest that the Court also grant plenary review in *Magana-Pizano*, because the court of appeals in that case addressed the constitutional issues and held that what it perceived as Congress's total deprivation of judicial review over all of Magana-Pizano's challenges to his deportation order violated the Suspension of Habeas Corpus Clause, U.S. Const. Art. I, § 9, Cl. 2. See 98-836 Pet. App. 9a-19a.

If the Court follows the course we outline here, it might choose to hold our petition for a writ of certiorari in *Goncalves* pending its decision in this case and *Magana-Pizano*, rather than granting plenary review in *Goncalves* as well, as we initially suggested in our petition in *Goncalves*.

It is therefore respectfully submitted that the petition for a writ of certiorari and the conditional cross-petition for a writ of certiorari should be granted, and should be consolidated for briefing and argument.

SETH P. WAXMAN
Solicitor General

JANUARY 1999